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Public Prosecutor v Norhazwan bin Abd Wahab

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–87–04 OF 2013
MOHTARUDIN BAKI, MAH WENG KWAI AND TENGKU MAIMUN JJCA
31 MARCH 2014

Criminal Procedure — Appeal — Facts, finding of — Whether trial judge correctly evaluated relevant material facts — Whether accused's defence rebutted statutory presumption that he had knowledge of drugs in his possession — Dangerous Drugs Act 1952 s 37(d)

The instant appeal was against the High Court's decision to acquit and discharge the respondent on a charge of trafficking in 1,767g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). The prosecution's case was that the drugs and the respondent's wallet were found in a bag in the carrier of a motorcycle the respondent was riding when he was stopped by police and that the respondent attempted to run away when he was stopped. The respondent, however, denied knowledge of the drugs and claimed the bag was placed in his carrier by his friend, Apit, who was riding on another motorcycle near him at the material time. The respondent said Apit managed to get away and avoid arrest. The evidence showed the respondent had spoken of Apit both in his cautioned statement to police as well as to his father on the evening of his arrest.

Held, dismissing the appeal and affirming the decision of the High Court:

(1) Apit was not a fictitious person. He was, in fact, called by the prosecution to rebut the respondent's evidence that it was Apit who had placed the bag in the carrier. The trial judge wholly rejected Apit's evidence as he found Apit to be an untruthful and unreliable witness. Apit had given two contradicting accounts of his whereabouts at the material time to show he was nowhere near the respondent just before the latter was arrested. The trial judge was correct to hold that Apit was not a truthful witness as he had given conflicting evidence on a material fact without any valid explanation. It was probable Apit had also lied when he denied meeting the respondent on the day in question (see para 7(a)).

(2) The prosecution contended that it was not relying upon the presumption under s 37(d) of the DDA and that its case was that the respondent had actual knowledge of the cannabis. But given the respondent's evidence that Apit had placed the bag in his carrier and that he was told to ride his motorcycle into *Lorong* 11, the court was of the view the respondent did

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not have knowledge of the contents of the bag. The bag was zipped up and was not transparent and the respondent was prevented by Apit from opening the bag when he tried to do so. The respondent's defence was sufficient to rebut the s 37(d) presumption even though the prosecution was not relying upon it (see paras 7(e) & (f)).

(3) The court found it was highly improbable for the respondent to have placed his wallet in the bag containing the drugs unless he was unaware the bag contained the drugs, in which case it could not be said that the respondent had knowledge of the drugs in the bag (see para 7(c)).

(4) Evidence in support of SP7's contention that the respondent attempted to run away when he was stopped was lacking. SP7 could have, but failed, to mention this incriminating piece of evidence in his police report (see para 7(b)).

(5) The court was of the view the trial judge had not wrongly evaluated the relevant material facts (see para 7(g)).

[Bahasa Malaysia summary

Rayuan ini adalah terhadap keputusan Mahkamah Tinggi untuk membebaskan dan melepaskan responden atas tuduhan mengedar dadah kanabis sebanyak 1,767g, kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Kes pihak pendakwaan adalah bahawa dadah dan dompet responden dijumpai di dalam beg di dalam tempat barang motosikal yang ditunggangi oleh responden apabila dia ditahan oleh polis dan bahawa responden cuba untuk melarikan diri apabila dia ditahan. Responden walau bagaimanapun, menafikan pengetahuan mengenai dadah tersebut dan mendakwa beg tersebut diletakkan dalam tempat barang oleh kawannya, Apit, yang menunggang motosikal lagi satu yang berdekatan dengannya pada masa material. Responden menyatakan Apit dapat melarikan diri untuk mengelak tangkapan. Keterangan menunjukkan responden bercakap mengenai Apit di dalam kedua-dua pernyataan beramaran kepada polis dan juga kepada bapanya di malam penangkapannya.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Apit bukan orang yang direka. Dia sebenarnya dipanggil oleh pihak pendakwaan untuk mematahkan keterangan responden bahawa adalah Apit yang meletakkan beg di dalam tempat barang. Hakim perbicaraan menolak keterangan Apit keseluruhannya kerana beliau mendapati Apit adalah saksi yang tidak bercakap benar dan tidak boleh dipercayai. Apit telah memberikan dua keterangan yang berlawanan mengenai di mana dia berada pada masa material untuk menunjukkan yang dia bukan berdekatan responden sejurus sebelum responden ditangkap. Hakim perbicaraan betul untuk memutuskan bahawa Apit bukan saksi yang

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bercakap benar kerana dia memberikan keterangan yang berlawanan atas fakta material tanpa apa-apa penjelasan yang sah. Kemungkinan Apit juga berbohong apabila dia menafikan berjumpa responden pada hari yang dipersoalkan (lihat perenggan 7(a)).

(2) Pihak pendakwaan berhujah bahawa ia tidak bergantung ke atas anggapan di bawah s 37(d) ADB dan bahawa kesnya adalah bahawa responden mempunyai pengetahuan sebenar mengenai kanabis tersebut. Tetapi dengan keterangan responden bahawa Apit telah meletakkan beg dalam tempat barangnya dan bahawa dia disuruh menunggang motosikalnya di Lorong 11, mahkamah berpendapat responden tidak mempunyai pengetahuan mengenai kandungan beg tersebut. Beg tersebut dizipkan dan tidak lut sinar dan responden dihalang oleh Apit daripada membuka beg tersebut apabila dia mencuba untuk berbuat sedemikian. Pembelaan responden adalah mencukupi untuk mematahkan anggapan s 37(d) walaupun pihak pendakwaan tidak bergantung ke atasnya (lihat perenggan 7(e) & (f)).

(3) Mahkamah mendapati adalah tidak mungkin untuk responden meletakkan dompetnya di dalam beg yang mengandungi dadah kecuali dia mengetahui beg tersebut mengandungi dadah, dengan itu ia tidak dapat dikatakan bahawa responden mempunyai pengetahuan mengenai dadah di dalam beg tersebut (lihat perenggan 7(c)).

(4) Keterangan dalam menyokong hujahan SP7 bahawa responden cuba melarikan diri apabila dia ditahan adalah tidak mencukupi. SP7 boleh, tetapi gagal untuk memberitahu keterangan yang membuktikan seseorang bersalah dalam laporan polisnya (lihat perenggan 7(b)).

(5) Mahkamah berpandangan bahawa hakim perbicaraaan tidak tersalah dalam menilai fakta material yang relevan (lihat perenggan 7(g)).]

Notes

For cases on finding of facts, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 580–672.

Cases referred to

Karthiyayani & Anor v Lee Leong Sin & Anor [1975] 1 MLJ 119, FC (refd)
PP v Letchumanan a/l Suppiah [2006] 2 MLJ 555; [2006] 1 CLJ 557, CA (distd)
PP v Lin Lian Chen [1992] 2 MLJ 561, SC (refd)
Tan Kim Ho & Anor v PP [2009] 3 MLJ 151; [2009] 3 CLJ 236, FC (refd)

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Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), 39B(1)(a), (2)

Appeal from: Criminal Appeal No 45–53–12 of 2011 (High Court, Pulau Pinang)

Samihah bt Rhazali (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Yagoo Subramaniam (Yagoo & Assoc) for the respondent.

Mah Weng Kwai JCA (delivering judgment of the court):

THE CHARGE

[1] On 30 March 2011 at about 5.30pm the respondent was arrested for being in possession of 1,767g of cannabis and was charged in the Penang High Court for an offence of trafficking in a dangerous drug under s 39B(1)(a) and punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act').

THE PROSECUTION'S CASE

[2] On information received, the respondent was arrested by the police when he was riding his motorcycle alone behind Lorong 11, Taman Guar Perahu, Kubang Semang, Penang. Upon a search of the motorcycle, Insp Aziz bin Chak ('SP7') recovered a sports bag from the carrier of the motorcycle which contained tow slabs of compressed dried leaves wrapped with plastic suspected to be cannabis and a wallet belonging to the respondent. A body search of the respondent was carried out but nothing incriminating was found. SP7 testified that the respondent attempted to run away when he was stopped by the police.

THE DEFENCE

[3] The defence of the respondent was that the bag had been placed in the carrier of his motorcycle by a friend known as 'Apit' who was riding on another motorcycle, together with the respondent at the material time. Apit managed to get away and was not arrested.

[4] The respondent denied knowledge of the contents of the bag and said that his wallet was not recovered from the bag but from his trouser pocket.

[5] The respondent also denied attempting to run away when he was stopped.

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THE HIGH COURT TRIAL

[6] The learned trial judge at the close of the prosecution's case held that the prosecution had established a prima facie case of drug trafficking under s 39B(1)(a) and called upon the respondent to enter into his defence.

[7] The respondent elected to give his evidence on oath and at the close of defence the learned trial judge held that the respondent had managed to successfully cast a doubt on the prosecution's case and hence acquitted and discharged the respondent of the offence.

THE APPEAL

[8] Being dissatisfied with the decision of the learned trial judge the appellant appealed to the Court of Appeal against the order of acquittal and discharge.

DECISION ON APPEAL

[9] Upon reading the record of appeal, the written submissions of the deputy public prosecutor and counsel for the respondent and upon hearing the deputy public prosecutor and counsel aforesaid, the court decided unanimously to dismiss the appeal and to affirm the order of acquittal and discharge of the High Court.

GROUNDS OF DECISION

[10] To begin with, it must be emphasised that this appeal was entirely fact based and premised upon inferences made from the facts by the learned trial judge. The court in deciding to uphold the decision of the learned trial judge considered and determined the following main issues:

(a) soon after his arrest the respondent had mentioned the name of Apit to his father ('SP2') at about 10pm that same evening. Further the investigating officer ('SP5') had said in evidence that a cautioned statement under s 37 of the Act had been recorded from the respondent and in it the respondent had mentioned the name of Apit. Apit was not a fictitious person as he was in fact called by the prosecution as SP6. Apit's full name is Mohammad Hafiz bin Fazil.

Apit was a material witness and was called to rebut the evidence of the respondent that Apit was the one who had placed the bag in the carrier of the respondent's motorcycle. However, the evidence of Apit was wholly rejected by the learned trial judge who considered him to be an unreliable witness and not a witness of truth. The learned trial judge had come to

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this conclusion because Apit had given two contradicting accounts of his whereabouts on 30 March 2011 at about 5.30pm in an attempt to show that he was nowhere near the respondent just before the respondent was arrested. In his earlier evidence Apit had said that he was working at the Pan Fabric factory on 30 March 2011 from 8am and that he reached home only at about 6.30pm and that he did not meet the respondent. On being challenged by counsel for the respondent, Apit said he could produce his punch card to show that he was working that day from 8am to 5pm. However, at the continued hearing of the case Apit, who did not produce his punch card, changed his evidence on his whereabouts entirely and said that he was at home with his sister Norhafiza and mother. This latter evidence contradicted materially with the evidence of the investigating officer Insp Siti Nurshida bt Ali ('SP5') who testified that her investigations revealed that Apit was at his work place at all material times! It will be noted that the prosecution did not call either Apit's sister and/or mother to support his changed evidence. We are of the view that the learned trial judge was correct in holding that Apit was not a truthful witness as he had given conflicting evidence on a material fact without any valid explanation (see *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119). In our judgment it is probable that Apit also lied when he denied meeting the respondent on the day in question;

(b) SP7 claimed that the respondent attempted to run away when he was being stopped whereas the respondent had denied this allegation. While the court agrees with the prosecution that generally when a suspect flees from the scene of crime it may indicate a guilty mind, but the court must be satisfied as to whether the evidence of the witness who says this can be supported. In this case the court finds that the evidence in support of SP7 lacking. He could have but failed to mention this incriminating piece of evidence in his police report;

(c) SP7 testified that he recovered the respondent's wallet containing his identity card, driving licence and Maybank ATM card, from the bag whereas the respondent said that it was recovered from his rear trouser pocket. The learned trial judge held that it was more probable for the wallet to be recovered from the respondent's trouser pocket as 'no sane or reasonable man would place his wallet containing his identity card in the bag P14 knowing that the said bag contained proscribed drugs which attract the death penalty'. While the learned trial judge may have been a little too dramatic when he said that the recovery of the wallet in the bag was 'too good to be true', but what it really pares down to is that it is highly improbable for the respondent to place his wallet in the bag containing the drugs unless of course he was unaware that the bag did in fact contain the drugs, in which case then it cannot be said that the respondent had knowledge of the drugs being in the bag;

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(d) the prosecution contended that if Apit was present at the scene he too would have been arrested. The court is of the view that this may not necessarily have been so if Apit was indeed an informer but unfortunately no evidence was led on this important point;

(e) from the facts it was not in dispute that the respondent was in possession of the motorcycle and was in custody and control of the bag which was in the carrier of the motorcycle (see *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561).The prosecution contended that the respondent had actual knowledge of the cannabis inside the bag and was not relying on the presumption under s 37(d) of the Act. But given the evidence of the respondent that the bag was placed in his carrier by Apit and was told to ride his motorcycle into *Lorong* 11, the court is of the view that the respondent did not have knowledge of the contents of the bag as firstly the bag was zipped and not transparent and secondly the respondent was prevented by Apit from opening the bag when he tried to do so after Apit had placed the bag into the motorcycle carrier;

(f) in any event, it is the judgment of the court that the defence of the respondent was sufficient to rebut the statutory presumption under s 37(d) of the Act, although it was not relied on by the prosecution (case of *Public Prosecutor v Letchumanan a/l Suppiah* [2006] 2 MLJ 555; [2006] 1 CLJ 557 (CA) distinguished); and

(g) the court is mindful of the established principle of law that when dealing with findings of facts, the trial judge is more often than not, to be in a better position to decide. The appellate court must be reluctant to interfere with such findings, unless the facts obviously disclose the court below had clearly and wrongly evaluated the facts, as enunciated in the case of *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236 (FC). In the present case we do not think that the learned trial judge had wrongly evaluated the relevant material facts.

CONCLUSION

[11] In the result, the appeal was dismissed and the order of the High Court affirmed.

Appeal dismissed and decision of the High Court affirmed.

Reported by Ashok Kumar